Alternative dispute resolution in Sale and Purchase Agreement disputes

Conciliation

We have recently been instructed as a conciliator in a shareholder dispute in France in respect of an asset/liability warranty. Whatever result this conciliation may come to, it is clear for all parties that the time set aside for the conciliation can be very effectively used to:

• reduce the discrepancies between the two parties; or
• allow them to understand better the case of the opposing party.

In a recent case where the claim originally amounted to more than 40% of the purchase price, the economic and financial analysis which prevailed during the conciliation work allowed the parties to reduce the gap between them by more than 50%. The final remaining dispute was therefore easier to solve through a traditional litigation process.

It is clear that the development of mediation and conciliation in France in such disputes is based on the idea that judicial proceedings are costly and ineffective in terms of time, and the existence and success of such alternative processes has proved the point.

Expert determination

It is not uncommon for disputes to arise following the preparation of draft completion accounts under a Sale and Purchase Agreement ("SPA"). Expert determination is the generally accepted process in the UK, amongst other countries, for resolving such disputes, particularly when the parties are either unable or unwilling to negotiate a settlement.

However, it is becoming increasingly common for the parties to settle completion accounts disputes by way of negotiation. The SPA generally allows time for the parties to reach agreement before expert determination. The benefits of a negotiated settlement are that the matter can often be dealt with more quickly and cost effectively.

We are often instructed to assess the strength of our client’s position for the purposes of the negotiation, and to develop arguments to support our client’s position. Our experience of being appointed as an expert is invaluable in this process. In addition to identifying the strength of our client’s case, we will use our expertise to identify and counter the arguments that may be presented by the other party and their advisors.

In the event that the dispute cannot be settled by negotiation, then it will be referred to expert determination. We may be appointed to act as the independent expert. We will take evidence through written and oral submissions from the parties and then determine the matters in dispute.

We may also use our experience of the expert determination process to assist our own clients involved in the process, by preparing submissions and dealing with questions raised by the independent expert.

Further, by using the experience gained from completion accounts disputes, we are able to work with our clients and their legal advisors pre-completion, by ensuring the SPA meets their objectives. We can also advise on the structure of the completion accounts mechanism, to manage the risk of unwelcome surprises post completion.

“We have experienced first-hand both the time savings and cost efficiencies gained by using such alternative dispute resolution schemes.”

Luc Marty
Partner, Mazars France
Preventing employee fraud

In the UK, we have noted an increase in the number of employee fraud cases being referred to our team. With the ongoing credit crunch and with thousands of individuals due to come off low-rate fixed mortgages this year, we suspect more and more trusted individuals are going to be tempted to bolster their personal finances from less traditional sources.

No matter how long-standing a relationship has been, employees faced with a financial crisis (such as suddenly being unable to pay the mortgage) may be tempted to “normal” the money to resolve the immediate crisis. Employers should remove the temptation to solve personal financial problems by company assets by eliminating opportunities for the employee to remove the assets undetected.

In many of the cases we have seen, the trust an employer has placed in an employee has been a key factor in allowing the defalcation to take place. A high level of trust can lead to an assumption that controls over that individual’s activities are not required. Even when warning signs are apparent, they are sometimes ignored because they contradict the employer’s idea of the individual as an honest person.

Fraud often starts when a personal financial need causes an employee to exploit a weakness in the system to obtain cash or other assets. The individual will often test the system with a small defalcation to see if the fraud remains unnoticed. If this is successful, then the fraudster will be tempted to repeat the offence whenever the need arises and there is opportunity, getting more confident with each transaction and often taking larger and larger sums until it can no longer be covered up easily.

Our experience has shown that the adoption of a combination of some or all of the following policies may help minimise the possibility of financial and reputational loss:

1. Visit all new employees and follow up references properly.
2. Institute segregation of duties. No one person should have responsibility for more than one of the following:
   a) access to or control of physical assets or cash;
   b) ability to make entries in the accounting records;
   c) authority to authorise transactions (i.e. the removal of cash or assets);
3. It is much harder to perpetrate a fraud when it relies on collusion with others.
4. If it is impossible or impracticable to put point 2 into practice, ensure that each individual’s work is checked by another. This will limit the opportunity for someone to take assets or cash without being noticed.
5. Assets should be reconciled to the accounting records. In particular, a non-financial senior manager or director should review the bank reconciliations and periodically agree payees per the books to those actually paid by the bank. In our experience, this type of review would have identified many employee frauds well before they were actually uncovered.
6. As employment service lengthens continue to apply the same internal controls and checks.
7. Watch out for employees who do not take their holidays or are constantly working late or coming in early, even if there appears to be a legitimate reason.
8. Watch out for employees who have a sudden change of lifestyle or appear to be living beyond their means.
9. Consider changing roles or routines periodically.
10. Rely as little as possible on trust alone. In our experience, it has often been the most trusted employees who have stolen from their employer.

Introduction

Welcome to the first newsletter from our international forensic and investigation services team. In each issue, we will address topical matters that are impacting our forensic teams around the globe. In this edition, we focus on France, the Netherlands and the United Kingdom.

In future, we are planning to include articles on other countries, including Ireland and Germany. We hope you will find this newsletter useful. We would welcome your feedback. And please send us your email address if you would prefer to receive an electronic version of the next newsletter.

Feedback and subscription requests can be sent to louisa.matheson@mazars.co.uk.

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Millie McCartney - out of time and out of pocket

The 2008 divorce settlement between Sir Paul McCartney and Ms Heather Mills certainly caught the public interest for, amongst other things, the sums involved. Of more interest to forensic accountants, of course, was the judge’s finding on the quality of the evidence given in court.

Ms Mills claimed £15.5 million when her marriage to the former Beatles star broke down after four years, but she was awarded only £44.3 million, between a lump sum of £14.5 million and assets of £7.8 million. She argued that Sir Paul’s assets were worth £800 million, when in fact the judge found that they were worth approximately £400 million.

The judge also commented on the evidence and expertise of the expert accountants, who were involved in several aspects of the case, including:

- a valuation of Sir Paul’s business assets at the date of marriage and at the date of separation;
- a joint report on the valuation of Sir Paul’s business assets at the date the couple had begun to cohabit;
- an assessment of what constituted Ms Mills’ reasonable income needs.

In relation to the valuation of Sir Paul’s business assets, the two forensic accountants differed in opinion by 20 million, this difference arising largely from the choice of multiples applicable to the music industry.

On this issue the judge relied upon the opinion of the accountant who had more relevant experience of the music industry.

In relation to assessing Ms Mills’ income needs, Sir Paul’s accountant in giving evidence admitted that he had never had to construct a budget or undertake an exercise into what constituted reasonable income needs. Because of this lack of experience on this issue, the judge found his report to be of limited assistance.

The judge’s findings highlighted the importance of choosing an expert with the relevant technical knowledge and appropriate experience. For example, when valuing a business or income stream, the expert should not only have the technical knowledge to undertake such a valuation but also have experience of the type of business being valued; management buyout or listed companies and also, in the case of specialist industries such as media, insurance or technology, the relevant industry knowledge.

Suspensions of real estate fraud in the Netherlands

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The AG claims that:

- it is likely that these intermediaries received kickbacks, whereby the construction companies received larger proceeds which were then paid on to the intermediaries. This case has caused great turmoil in the Dutch business world. The AG now has to provide compelling evidence to support these allegations and we are likely to hear more about this case for months, if not years, to come.

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